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December 23, 2010

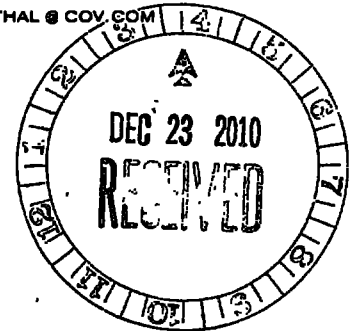
BY HAND

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings

DEC 23 2010

Part of
Public Record



Re: Finance Docket No. 32549, *Burlington Northern Inc. and Burlington Northern Railroad Company – Control and Merger – Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company*

Dear Ms. Brown:

Enclosed for filing *under seal* are an original and ten copies of the Highly Confidential version of Union Pacific's Petition to Institute a Proceeding to Clarify the Fee Adjustment Mechanism for Trackage Rights Imposed as a Condition on the BN/Santa Fe Merger.

We have separately enclosed for filing in the Board's *public docket* an original and ten copies of a Redacted version. Material that has been redacted from the Highly Confidential version is indicated by brackets.

Please acknowledge receipt of this material by date stamping the enclosed extra copies of these filings and returning them to our messenger.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael L. Rosenthal'.

Michael L. Rosenthal

Enclosures

cc: Parties of Record

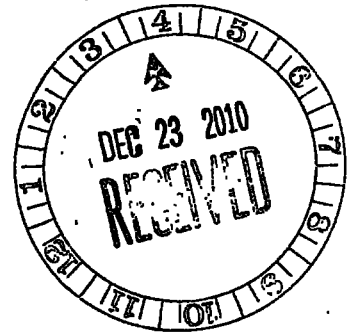
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UP-10

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 32549

**BURLINGTON NORTHERN INC. AND
BURLINGTON NORTHERN RAILROAD COMPANY
– CONTROL AND MERGER –
SANTA FE PACIFIC CORPORATION AND
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY**



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**PETITION TO INSTITUTE A PROCEEDING TO CLARIFY
THE FEE ADJUSTMENT MECHANISM FOR TRackage RIGHTS
IMPOSED AS A CONDITION ON THE BN/SANTA FE MERGER**

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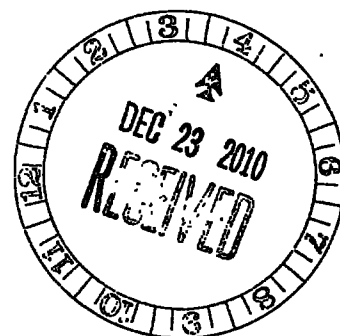
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December 23, 2010

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32549



BURLINGTON NORTHERN INC. AND
BURLINGTON NORTHERN RAILROAD COMPANY
– CONTROL AND MERGER –
SANTA FE PACIFIC CORPORATION AND
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

**PETITION TO INSTITUTE A PROCEEDING TO CLARIFY
THE FEE ADJUSTMENT MECHANISM FOR TRACKAGE RIGHTS
IMPOSED AS A CONDITION ON THE BN/SANTA FE MERGER**

I. INTRODUCTION

Union Pacific Railroad Company (“UP”) hereby asks the Surface Transportation Board (“Board”) to institute a proceeding to resolve a dispute between UP and BNSF Railway Company (“BNSF”) regarding the fees UP must pay for trackage rights that the Interstate Commerce Commission (“ICC”) imposed as a condition on the merger of Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (“BN/Santa Fe”).

Since the ICC imposed the trackage rights in 1995, the fees UP must pay to use the trackage rights have escalated at a rate that far exceeds the increase in BNSF’s operating costs associated with those rights. The divergence between fees and costs has produced a situation that is contrary to the ICC’s purpose when imposing the trackage rights that “the tenant must be put on an equal footing with the landlord.” *Burlington Northern et al. – Merger – Santa Fe Pacific et al.* (“BN/SF”), 10 I.C.C.2d 661, 771 (1995).

There is a ready solution to this problem. In their merger settlement and trackage rights implementing agreements, BNSF's and UP's predecessors included a "truing" provision designed to ensure the trackage rights fees would continue to reflect the same basic relationship to operating costs as upon execution of the agreements. Moreover, BNSF and UP already apply a Board-sanctioned fee adjustment mechanism that specifically identifies the relevant operating costs to maintain the balance between rates and costs for the trackage rights imposed as conditions in *Union Pacific Corp. – Control & Merger – Southern Pacific Rail Corp.* ("UP/SP"), 1 S.T.B. 223 (1996). But despite repeated requests, BNSF has thus far resisted UP's proposals for implementing the truing provision to put UP back "on an equal footing with [BNSF]." *BN/SF*, 10 I.C.C.2d at 771.

The Board should assert its jurisdiction over this dispute and ultimately determine the appropriate adjustment to the trackage rights fees.¹ The written agreements between the parties contain arbitration clauses. Nevertheless, precedent establishes that the Board should resolve this dispute. The Board previously asserted jurisdiction, despite the presence of an arbitration clause, when BNSF sought relief in a similar dispute regarding the adjustment of fees for trackage rights imposed as a condition a merger. *See UP/SP*, Decision No. 96 (STB served Mar. 21, 2002); *UP/SP*, Decision No. 98 (STB served Oct. 22, 2002).² Like that earlier case, this dispute involves a "general matter[]" [*i.e.*, a trackage rights fee adjustment mechanism] with

¹ The Board plainly has continuing authority to address any merger-related concerns arising out of conditions imposed on mergers. *See* 49 U.S.C. § 11327; *Union Pacific Corp. – Control & Merger – Southern Pacific Rail Corp.*, STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 21 (STB served Dec. 20, 2001) at 5.

² In fact, the Board asserted jurisdiction even though UP had commenced an arbitration proceeding as to the fee adjustment dispute before BNSF sought relief from the Board. *See UP/SP*, Decision No. 96 at 3.

broad implications with respect to implementation” of the conditions imposed on a merger. *UP/SP*, Decision No. 96 at 3-4 (internal quotation omitted). As the Board explained in *UP/SP*, “it is important that the trackage rights fee adjustment mechanism work as intended, so that any increases or decreases in [the landlord’s] costs are properly reflected in the agreed-upon adjustments to the trackage rights fee.” *Id.* at 6 (internal quotation omitted). In sum, Board resolution is necessary to ensure that UP is able to compete effectively with BNSF both now and into the future, as the ICC intended when it imposed the trackage rights as a condition in *BN/SF*.

Like the agreement at issue in *UP/SP*, the agreements at issue here contain arbitration clauses, but the Board has made clear that disputes over matters with broad implications for implementation of conditions imposed on a merger are “better suited to resolution in an administrative proceeding than in an arbitration proceeding.” *Id.* at 4.

Accordingly, UP asks the Board to adopt a procedural schedule to govern the submission of evidence and argument by UP, BNSF, and other interested parties.

II. FACTUAL BACKGROUND

This matter involves UP trackage rights over BNSF in the Pueblo, Colorado, to Fort Worth, Texas, corridor that the ICC imposed as a condition on the BN/Santa Fe merger to ameliorate competitive harms that would have resulted from an unconditioned merger of BN and Santa Fe. As discussed below, the fee UP must pay to use the trackage rights has increased at a significantly faster rate than BNSF’s operating costs and is undermining the effectiveness of the condition imposed by the ICC.

A. The ICC Imposed The Pueblo-Fort Worth Trackage Rights To Ameliorate Merger-Related Competitive Harms.

The ICC imposed the Pueblo-Fort Worth trackage rights to ameliorate competitive harm in the Pueblo-Fort Worth corridor, and at Amarillo, Plainview, and Lubbock, Texas, that would

have resulted from an unconditioned merger between Burlington Northern Railroad Company (“BN”) and The Atchison, Topeka and Santa Fe Railway Company (“Santa Fe”). In *BN/SF*, the ICC found that “Santa Fe and BN compete for traffic moving either in that corridor or from or to those points, and rate concessions deriving from the head-to-head competition between BN and Santa Fe are well documented.” *BN/SF*, 10 I.C.C.2d at 739. The ICC concluded that the merger, “if not conditioned, would result in competitive harm in the Pueblo-Fort Worth corridor, and at Amarillo, Plainview, and Lubbock.” *Id.*

Specifically, the ICC remedied the competitive harm by imposing as conditions portions of two merger-related settlement agreements: one among BN, Santa Fe, and The National Industrial Transportation League (“NITL”), and another among BN, Santa Fe, and SP.³ (UP obtained these rights when it merged with SP.)

BN, Santa Fe, and SP entered into a settlement agreement on April 13, 1995 (the “SP Agreement”) (Exhibit A hereto). In that agreement, BN and Santa Fe agreed to grant SP trackage rights over Santa Fe between Pueblo, Colorado, and Stratford, Texas, and over BN between Dalhart, Texas, and Fort Worth, Texas. They also agreed to grant SP access to all industries served directly or by reciprocal switching by either BN or Santa Fe at Amarillo, Plainview, and Lubbock. *See BN/SF*, 10 I.C.C.2d at 811.⁴

³ The ICC used “SP” to refer to affiliates Southern Pacific Transportation Company, Denver and Rio Grande Western Railroad Company, St. Louis Southwestern Railway Company, and SPCSL Corp. *See id.* at 667 n.9. We adopt that usage in this petition.

⁴ The SP Agreement also included other pro-competitive grants of trackage rights to SP that were not imposed as conditions on the merger. *See id.* Those other rights are subject to the same fee escalation provision as the Pueblo-Fort Worth trackage rights, but because they were not imposed as conditions on the merger, UP does not believe that its dispute with BNSF regarding the escalation of fees for those rights is subject to the Board’s jurisdiction. Accordingly, UP intends to institute an arbitration proceeding against BNSF with respect to those other rights, but (continued...)

BN and Santa Fe also entered into a settlement agreement with NITL on May 26, 1995 (the "NITL Agreement"). In Paragraph 1(b) of the NITL Agreement, BN and Santa Fe agreed that they would grant SP the same rights in the Pueblo-Fort Worth corridor that they had agreed to grant SP in the SP Agreement. *See BN/SF*, 10 I.C.C.2d at 763.

The ICC expressly imposed as conditions both Paragraph 1(b) of the NITL Agreement and the operative provisions of the SP Agreement that provided SP with rights in the Pueblo-Fort Worth Corridor and at Amarillo, Plainview, and Lubbock. *See id.* The ICC explained that it regarded the trackage rights condition as "essential to [its] approval of [the] merger." *Id.* at 774.

B. UP's Fees For Using The Pueblo-Fort Worth Trackage Rights Are Subject To A "Truing" Provision Designed To Preserve Effective Competition.

The SP Agreement contains several provisions that affect the fees UP must pay to use the Pueblo-Fort Worth trackage rights, including a "truing" provision designed to ensure that the trackage rights would continue to preserve competition in the Pueblo-Fort Worth corridor.

First, the parties agreed to an initial rate per gross ton mile ("GTM") that SP would pay to use the trackage rights. The agreed-upon rate was { } mills per GTM, except for unit trains, and { } mills per GTM for unit trains. *See SP Agreement* ¶ 5(a).

Second, the parties agreed to an annual fee adjustment mechanism. They agreed that the GTM rate would be subject to adjustment annually to reflect { }
}. *See id.*

¶ 8.

we will suggest to BNSF that the parties agree to hold the arbitration proceedings in abeyance pending a decision by the Board regarding the Pueblo-Fort Worth trackage rights.

Third, the parties agreed to a “truing” provision. They recognized that annual adjustments to fees based on { } might not accurately reflect the actual changes in the landlord’s operating costs over time. They therefore agreed that, {

} *Id.*

These fee provisions, including the truing provision, are contained not only in the SP Agreement, but also in the separate trackage rights implementing agreements that SP negotiated with BN and Santa Fe. *See* SP-BN Implementing Agreement ¶ 4 (Exhibit B hereto) & SP-Santa Fe Implementing Agreement ¶ 4 (Exhibit C hereto).

Together, the fee provisions were intended “to preserve effective competition in markets that would otherwise experience a reduction in competition” and to address the ICC’s objective that “the tenant must be put on an equal footing with the landlord.” *BN/SF*, 10 I.C.C.2d at 771.

C. The Trackage Rights Fees UP Must Pay Have Increased Faster Than BNSF’s Costs, Upsetting The Competitive Balance The ICC Intended To Achieve.

UP is no longer on an equal footing with BNSF with regard to the Pueblo-Fort Worth trackage rights. Since 1995, the fees UP must pay to use the Pueblo-Fort Worth trackage rights have increased at a rate that far exceeds the increase in BNSF’s associated operating costs. In other words, the repeated application of the annual adjustment mechanism {

} produced increases in fee levels that greatly exceeded the increase in costs actually experienced by BNSF. This leaves UP at a significant competitive disadvantage in the Pueblo-Fort Worth corridor, contrary to the parties’ intent and the ICC’s expectations in *BN/SF*.

Specifically, from 1995 to 2009, through application of the { } adjustment process, the fees UP must pay to use the Pueblo-Fort Worth trackage rights have increased by

{ } mills per GTM, or 53%, even though BNSF operating costs have increased by only { } mills per GTM, or less than 1%.⁵ In contrast, through application of the Board-sanctioned fee adjustment mechanism over approximately the same period, the fees BNSF pays to use the trackage rights it obtained in the UP/SP merger increased by 0.4 mills per GTM, or 13%, which matches the change in UP operating costs. In other words, although the ICC and the Board sought to preserve pre-merger competition in both proceedings by imposing trackage rights, application of the RCAF-U adjustment process here has disrupted the competitive balance.

UP has urged BNSF to respect the SP Agreement truing provision and restore the competitive balance that the ICC sought to maintain when it imposed Paragraph 1(b) of the NITL Agreement and the Pueblo-Fort Worth rights in the SP Agreement as conditions in *BN/SF*. However, despite repeated requests by UP, and repeated promises by BNSF, BNSF has failed to provide a substantive response. UP believes that this matter must be resolved now and that it should be resolved by the Board.

III. THE BOARD SHOULD ADOPT A PROCEDURAL SCHEDULE FOR RECEIVING EVIDENCE TO RESOLVE THIS MATTER.

The Board should assert its jurisdiction over this matter. By this Petition, UP is asking the Board to establish a procedural schedule for receiving evidence from UP, BNSF, and any other interested parties to determine the appropriate methodology for applying the SP Agreement's truing provision.⁶ UP proposes a schedule in Part III.B.⁷

⁵ The calculation of BNSF costs reflects application of the cost-based fee adjustment mechanism used for the trackage rights in *UP/SP*.

⁶ UP is proceeding in this manner to ensure that BNSF and all other interested parties have sufficient notice and opportunity to participate in this proceeding. This process is consistent with the approach the Board has followed in similar proceedings. *See, e.g., UP/SP*, Decision No. 96 (continued...)

A. The Board Should Resolve This Matter.

UP submits that precedent, public interest, and considerations of practicality dictate that the Board should resolve this dispute between BNSF and UP. UP suspects that BNSF will object to the Board's jurisdiction because the agreements at issue provide for resolution of disputes by arbitration. However, the Board plainly has "jurisdiction to address" UP's concern that "unduly high rentals" are "undermin[ing] the efficacy of a trackage rights remedy" that the ICC considered "essential to [its] approval of [a] merger." *BN/SF*, 10 I.C.C.2d at 774. Moreover, Board precedent establishes that this dispute should be resolved by the Board, rather than through private arbitration between BNSF and UP. Specifically, the Board asserted jurisdiction when BNSF sought relief in a dispute regarding the process for adjusting fees for trackage rights imposed as a condition on the merger of UP and SP. Indeed, the Board asserted jurisdiction even though an arbitration proceeding was already underway. *See UP/SP*, Decision No. 96 at 3-4.

The Board's decisions in *UP/SP* make clear that the Board will not delegate to the private arbitration process its responsibility to ensure proper implementation of merger conditions, particularly one involving the preservation of pre-merger competition. The Board explained that disputes over "general matter[s] with broad implications with respect to implementation" of the conditions imposed on a merger are "better suited to resolution in an administrative proceeding than in an arbitration proceeding." *Id.* at 3-4 (internal quotation omitted). The Board also specifically recognized that its oversight of the fee adjustment process is critical to ensure the

at 6-7 (establishing schedule for "show cause" proceeding to address BNSF claims regarding adjustments to trackage rights fees imposed as merger condition); *UP/SP*, (unnumbered decision) (STB served May 7, 2007) (establishing schedule for proceeding to address UP petition for reformation of the Restated and Amended Settlement Agreement).

⁷ If BNSF does not agree to the proposed schedule, UP is willing to engage in good faith discussions over alternative schedules proposed by BNSF.

proper implementation of conditions imposing trackage rights. As the Board explained, “it is important that the trackage rights fee adjustment mechanism work as intended, so that any increases or decreases in [the landlord’s] costs are properly reflected in the agreed-upon adjustments to the trackage rights fee.” *Id.* at 6 (internal quotation omitted).

UP’s request that the Board assert jurisdiction in this matter is indistinguishable from BNSF’s request that the Board assert jurisdiction in *UP/SP*.⁸ This dispute also involves a “general matter[] with broad implications with respect to implementation” of conditions imposed in a merger. *Id.* at 3-4. The disparity between the fees UP pays for the trackage rights at issue and BNSF’s associated costs is undermining the effectiveness of conditions that the ICC imposed to ameliorate competitive harms in the Pueblo-Fort Worth corridor that would have resulted from an unconditioned merger of BN and Santa Fe. *See BN/SF*, 10 I.C.C.2d at 739.

More specifically, this dispute involves the critical role played by the fee adjustment mechanism when trackage rights are imposed as a condition to preserve pre-merger competition.

⁸ UP recognizes that not all of the disputes between BNSF and UP regarding the fee adjustment mechanism were resolved by the Board in *UP/SP*. Rather, some of the issues, which BNSF described as “technical disputes,” *see* Petition of The Burlington Northern and Santa Fe Railway Company for Clarification at 2 n.3, *Union Pacific Corp. – Control & Merger – Southern Pacific Rail Corp.*, STB Finance Docket No. 32760 (Dec. 21, 2001), were resolved through negotiation, *see* Joint Report Regarding Implementation of Section 12 of the BNSF Settlement Agreement, *Union Pacific Corp. – Control & Merger – Southern Pacific Rail Corp.*, STB Finance Docket No. 32760 (Dec. 11, 2002).

However, the Board made clear that even the “technical disputes” were subject to its jurisdiction. The Board observed that the disputes “appear[ed] . . . to have the potential to be general matters that could have broad implications with respect to BNSF’s trackage rights.” *UP/SP*, Decision No. 98 at 8. The Board therefore ordered UP and BNSF to submit for public comment and Board review and approval (i) a report describing their resolution of those matters and (ii) their proposed revisions to the settlement agreement incorporating their resolution of those matters. *Id.*

In any event, this proceeding does not involve “technical disputes.” As we explain in the text, it involves important questions of how to implement the SP Agreement in a manner that is consistent with the public interest conditions imposed on the BN/Santa Fe merger and the agency’s intent that UP remain “on an equal footing with [BNSF].” *BN/SF*, 10 I.C.C.2d at 771.

In *BN/SF*, the ICC explained that the “reason for imposing trackage rights as a condition to a merger is to preserve effective competition in markets that would otherwise experience a reduction in competition,” and that to preserve competition, “the tenant must be put on an equal footing with the landlord.” *BN/SF*, 10 I.C.C.2d at 711. The Board invoked those principles in *UP/SP*, when it explained that “it is important that . . . any increases or decreases in [the landlord’s] costs are properly reflected in the agreed-upon adjustments to the trackage rights fee.” *UP/SP*, Decision No. 96 at 6 (internal quotation omitted). As in *UP/SP*, the Board’s exercise of authority is necessary to ensure that the “trackage rights fee adjustment mechanism work as intended,” *id.*, and to carry out the agency’s intent that the trackage rights tenant remain “on an equal footing with the landlord,” *BN/SF*, 10 I.C.C.2d at 771.⁹

In addition, this is also a case in which other interested parties should have a full opportunity to be heard – an opportunity they would not have in a private arbitration. The ICC did not impose the Pueblo-Fort Worth trackage rights to benefit SP. Rather, the ICC imposed the trackage rights to prevent competitive harm to shippers. *See id.* at 763, 739. In fact, NITL was the party that insisted the Pueblo-Fort Worth rights be imposed as a condition on the merger. *See id.* at 677.

Finally, as in *UP/SP*, the Board has the experience and expertise to resolve this matter in the most efficient manner. The Board is better situated than any arbitrator to address issues regarding railroad costs and resolve disputes regarding trackage rights compensation. The Board

⁹ Indeed, in *BN/SF*, the ICC directed the applicants and SP to remove from the SP Agreement a provision that would have increased the fees for using the Pueblo-Fort Worth trackage rights if UP merged with SP. *See id.* at 774. As the ICC explained, “the compensation arrangement at issue is directly related to the competition issues that have been raised in this proceeding,” and the agency has “jurisdiction to address this compensation arrangement because unduly high rentals could undermine the efficacy of a trackage rights remedy that we think is essential to our approval of this merger.” *Id.*

is also better situated than an arbitrator to ensure that the outcome is consistent with its standards for trackage rights compensation in merger cases and the agency's intent to preserve effective competition in *BN/SF*. Furthermore, if the matter were arbitrated, UP, BNSF, and other interested parties would potentially be subjected to duplicative proceedings because the Board would have the final word on whether the result is consistent with the conditions the ICC imposed in *BN/SF*. See *UP/SP*, Decision No. 98 at 8.¹⁰

B. The Board Should Adopt The Procedural Schedule Proposed by UP.

UP believes the Board can resolve this matter efficiently and quickly. UP and BNSF already have an established method for ensuring that trackage rights fees remain consistent with associated operating costs – the method they have applied for almost 15 years to the trackage rights the Board imposed as a condition on the UP/SP merger. UP and BNSF previously described the method to the Board and disclosed it to interested parties, and it generated no objections.¹¹

Accordingly, UP proposes the following schedule, which would begin once the Board asserts jurisdiction over the dispute (Day “X”):

- UP and BNSF evidence and arguments: *X* + 60 days
- Comments by any other interested parties: *X* + 60 days
- Reply evidence and arguments from all parties: *X*+90 days

¹⁰ BNSF may argue that the Board could allow NITL and other parties an opportunity to participate in an administrative proceeding to review the outcome of an arbitration, but that would be inefficient and would result in further delay.

¹¹ See Joint Report Regarding Implementation of Section 12 of the BNSF Settlement Agreement, *Union Pacific Corp. – Control & Merger – Southern Pacific Rail Corp.*, STB Finance Docket No. 32760 (Dec. 11, 2002).

Finally, as a matter of administrative convenience, UP suggests that the Board require the parties that were on the *BN/SF* service list to provide notice within 20 days of the Board's decision asserting jurisdiction over this dispute if they wish to remain on the service list for purposes of this proceeding *See, e.g., UP/SP* (unnumbered decision) (STB served May 7, 2007) at 3.

IV. CONCLUSION

The Board should assert jurisdiction over UP's dispute with BNSF. Resolution of this dispute by the Board is essential to ensure that the conditions imposed by the ICC on the BN/Santa Fe merger continue to serve their intended purpose. Accordingly, UP asks the Board to institute a proceeding and adopt the procedural schedule set forth above.

Respectfully submitted,

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*Attorneys for Union Pacific
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December 23, 2010

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 23rd day of December, 2010, I caused copies of Union Pacific Railroad Company's Petition to Institute a Proceeding to Clarify the Fee Adjustment Mechanism for Trackage Rights Imposed as a Condition on the BN/Santa Fe Merger to be served as follows:

a copy of the Highly Confidential and Redacted versions by express overnight delivery on:

Roger Nober
Executive Vice President Law & Secretary
BNSF Railway Company
2600 Lou Menk Drive
Fort Worth, TX 76131-2830

a copy of the Redacted version, by first-class mail, postage prepaid, on all parties of record in Finance Docket No. 32549.



Michael L. Rosenthal

EXHIBIT A

REDACTED

EXHIBIT B

REDACTED

EXHIBIT C

REDACTED